United States Department of Labor
Employees' Compensation Appeals Board

M.K., Appellant	)	
and	)	**Docket No. 17-1852**
	)	**Issued: August 23, 2018**
U.S. POSTAL SERVICE, POST OFFICE, Levittown, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 30, 2017 appellant, through counsel, filed a timely appeal from an April 13, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

[3] The record provided to the Board includes evidence received after OWCP issued its April 13, 2017 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether appellant has met her burden of proof to modify OWCP's January 20, 2016 loss of wage-earning capacity (LWEC) determination.

FACTUAL HISTORY

On April 24, 1991 appellant, then a 34-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that she sustained a right shoulder injury while placing mail into a mailbox on that date. OWCP accepted that appellant sustained a right shoulder strain, right brachial plexus neuropathy, and right thoracic outlet syndrome during the performance of her federal duties. Appellant stopped work on April 26, 1991. Thereafter she returned to modified part-time work intermittently until July 14, 1997, when she stopped work and did not return. On May 30, 1997 OWCP expanded acceptance of the claim to include right thoracic outlet syndrome.[4] Effective August 16, 1997, it placed appellant on the periodic compensation rolls for total disability resulting from the accepted employment injury.[5]

In 2001 appellant came under the care of Dr. Scott M. Fried, an osteopath and Board-certified orthopedic surgeon, for ongoing problems with her upper extremities.

OWCP referred appellant for vocational rehabilitation in June 2012, following an April 20, 2012 second opinion examination by Dr. Robert Draper, a Board-certified orthopedic surgeon, who concluded that appellant was capable of working eight hours per day and lifting up to 50 pounds. As the employing establishment was unable to accommodate appellant, the vocational rehabilitation counselor identified several positions which were medically suitable and reasonably available, including the constructed position of sales attendant, a position listed in the Department of Labor's *Dictionary of Occupational Titles* (DOT) and bearing the DOT # 299.677.010. The physical duties of the position included: obtaining merchandise from stockroom when merchandise was not on the floor, arranging stock on shelves or racks in sales area, inventorying stock, keeping merchandise in order, and marking or ticketing merchandise. The position was characterized as light duty, which meant an occasional strength level of no greater than 20 pounds.

On May 14, 2014 OWCP referred appellant to Dr. Noubar Didizian, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether she continued to suffer from work-related residuals and whether she was capable of working eight hours per day as a sales attendant. In his June 25, 2014 report, Dr. Didizian opined that appellant no longer had any work-related residuals of the accepted conditions and no longer required any medical treatment. He noted that appellant had multiple diagnoses which were not related to the accepted injury. Dr. Didizian opined that appellant had reached maximum medical improvement and was capable of working eight hours a day as a sales attendant, DOT # 299.677.010.

[4] OWCP also authorized surgery for right brachial plexus neuropathy. However, the case record does not indicate that appellant underwent the authorized surgical procedure.

[5] On February 4, 1998 OWCP notified counsel that a left brachial plexopathy condition was not work related and denied a requested surgery.

In his reports dated July 31 and September 3, 2014, Dr. Fried diagnosed right shoulder capsulitis, left shoulder rotator cuff tendinitis and capsulitis, carpal tunnel median neuropathy of the bilateral upper extremities, radial neuropathy of right, sympathetically-mediated pain syndrome of the bilateral upper extremities with reactive depression, fibromyalgia syndrome, brachial plexopathy/cervical radiculopathy right and left with long thoracic neuritis, and bilateral posterior occipital neuralgia. He opined that appellant continued to struggle with symptoms from the work-related injury as well as the overuse symptoms on the left. Dr. Fried also opined that appellant remained limited and could not return to regular work activities.

OWCP determined that a conflict of medical opinion existed between Dr. Fried and Dr. Didizian with regard to whether she continued to suffer residuals from the work injury and was capable of returning to work in any capacity. It referred appellant, along with the medical record and a statement of accepted facts (SOAF), to Dr. Andrew Sattel, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

The SOAF, at the time of Dr. Sattell's referral, was dated April 11, 2012 with an addendum dated May 14, 2014. The April 11, 2012 SOAF listed the accepted conditions as a right shoulder strain and brachial plexus neuropathy. Concurrent conditions listed which were not accepted as work related included: carpal tunnel syndrome, hypothyroidism, endometriosis, headaches, fracture of coccyx (1997 motor vehicle accident), and a torn right rotator cuff in March 1990, "a year prior to the work injury." The May 14, 2014 addendum noted that appellant was examined on April 20, 2012 by Dr. Draper, that her current treating physician was Dr. Fried, and that she had remained off work completely since 1996.

In his November 19, 2014 report, Dr. Sattel noted the history of injury, his review of the medical records, and presented examination findings. He noted that there was no x-ray or magnetic resonance imaging scan films for personal review. Based on the present history obtained and the medical records provided, Dr. Sattel indicated that appellant was provided with an impression of right shoulder pain and brachial plexopathy -- thoracic outlet at the time of her initial incident and subsequent evaluations. He indicated that the right shoulder had some residual symptoms of impingement and the present objective findings for peripheral neuropathy or brachial plexopathy were unremarkable. Dr. Sattel indicated that, while appellant had some point tenderness over the supra and infraclavicular fossa, it did not reproduce paresthesias and the remaining evaluation for peripheral neuropathy was unremarkable. From an orthopedic standpoint, he opined that appellant had achieved maximum medical improvement and there was no need for further diagnostic workup, outpatient therapy, or any surgical intervention. Dr. Sattel opined that appellant could perform light work activities with restrictions, minimizing overhead work with the right arm, particularly with resistance. A November 19, 2014 estimated physical capacities form indicated that appellant could work eight hours a day in a light-duty capacity with no overhead lifting with her right arm.

In a December 17, 2014 letter, OWCP informed counsel that appellant was examined by Dr. Sattel on November 19, 2014 and that he would be provided a copy of the report once it was received. It enclosed the SOAFs, questions, the conflict statement, and a copy of the referral letter to Dr. Sattel.

In a January 7, 2015 letter, Dr. Sattel indicated that he was provided with a SOAF which included a synopsis of appellant's diagnoses and various physical activities observed from

October 6, 2009 through November 23, 2011. He indicated that a review of the SOAF would not alter his November 19, 2014 opinion.

On January 15, 2015 OWCP requested that Dr. Sattel provide a supplemental report regarding appellant's work capabilities and complete the work capacity evaluation (OWCP-5c) form. In a January 28, 2015 supplemental report, Dr. Sattel stated that he reviewed SOAFs dated April 11, 2012 and May 14, 2014 which did not alter his opinion that appellant was capable of working a full eight-hour day. In a January 28, 2015 OWCP-5c form, Dr. Sattel indicated that appellant could work sedentary to light duty, up to 20 pounds lifting or carrying, with no overhead lifting with right arm.

On June 25, 2015 OWCP reopened appellant's case in vocational rehabilitation to update the availability and wages of the previously identified position of sales attendant. On July 10, 2015 the vocational rehabilitation counselor indicated that the sales attendant position, which was classified as light duty, existed in reasonable numbers and was reasonably available for appellant. An undated salary of $16,950.00 was also provided.

On September 29, 2015 OWCP issued a notice of proposed reduction in appellant's wage-loss compensation under 5 U.S.C. §§ 8106 and 8115. It advised appellant that she was only partially disabled and that the position of sales attendant was medically and vocationally consistent with her medical limitations and work experience. OWCP found that appellant was capable of earning wages at the rate of $325.96 per week as a sales attendant and that the position was reasonably available within her commuting area. It provided an attachment detailing the application of the *Shadrick* formula,[6] which has been codified at 20 C.F.R. § 10.403. Appellant was afforded 30 days to submit evidence and argument challenging the proposed action.

In an October 7, 2015 report, Dr. Fried continued to report on appellant's bilateral upper extremity conditions.

An October 7, 2015 neuromusculoskelatal ultrasound procedure report indicated positive scans for carpal tunnel and compression neuropathy, brachial plexus left, brachial plexus right. No significant change in the right shoulder was noted.

On October 15, 2015 counsel acknowledged receipt of the September 29, 2015 notice of proposed reduction, although he had not been provided a copy by OWCP. He requested a copy of Dr. Sattel's report, with evidence that he had been properly selected as an impartial medical examiner. By letters dated November 10 and 13, 2015, OWCP provided the requested information.

In an October 20, 2015 report, Dr. Sofia Lam, a Board-certified anesthesiologist, diagnosed cervical sprain/strain, brachial plexopathy, right more than left side, cervical radiculopathy, and cervical facet joint pathology bilaterally. Cervical transforaminal epidurals and facet joint injections were recommended.

On November 20, 2015 counsel requested a copy of the Labor Market Survey, the vocational information, and a copy of the September 29, 2015 notice of proposed reduction. He

[6] *Albert C. Shadrick*, 5 ECAB 376 (1953).

advised that he was not copied on the September 29, 2015 notice of proposed reduction. On December 15, 2015 OWCP mailed copies of the requested information to appellant and counsel.

In a January 4, 2016 letter, counsel requested that OWCP reissue the notice of proposed reduction with full appeal rights as they were not issued with the proposed decision. He also argued that, since he was not notified of the September 29, 2015 notice of proposed reduction, that decision was not considered valid under 20 C.F.R. § 10.127.

By decision dated January 22, 2016, OWCP reduced appellant's compensation, effective February 2, 2016, based on her capacity to earn wages as a sales attendant, DOT # 299.677.010, at the rate of $325.96 per week. It found that the evidence of record showed that appellant was vocationally and physically capable of working as a sales attendant, based on Dr. Sattel's reports which were accorded the weight of the medical evidence. OWCP applied the *Shadrick* formula to adjust her compensation.

On January 13, 2017 counsel requested reconsideration. He stated that appellant had accepted conditions of brachial plexus neuropathy, bilateral thoracic outlet syndrome, and right shoulder strain. Counsel alleged that the SOAFs did not include the thoracic outlet syndrome as an accepted condition. He also indicated that, while the SOAF noted several concurrent conditions, it did not indicate other conditions which had been diagnosed prior to her accepted injury. Counsel also alleged that the proposed position of sales attendant was constructed before Dr. Sattel's referee examination and that Dr. Sattel was not asked, nor did he comment on, the propriety of the position proposed. He also argued that, while he received copies of Dr. Sattel's referee reports and the labor market study, he never received a description of the proposed position and the information from the rehabilitation counselor from 2013 through 2015. Counsel further contended that the demands of the sales attendant position were not medically suitable to the restrictions of both Dr. Fried and Dr. Sattel and that appellant's other conditions must be considered as they prevented her from being gainfully employed. In a January 17, 2017 letter, he referenced Dr. Fried's January 16, 2017 report as support that the constructed position was outside of appellant's medical capacities. Appellant also provided a January 12, 2017 letter, in which she provided reasons why she was unable to perform the duties of the constructed position.

Reports of ultrasound examination of appellant's right brachial plexus and right median nerve and carpal tunnel dated January 13, 2017 were provided along with a January 28, 2016 note from the Suburban Pain Control Center.

Dr. Fried reported on appellant's condition in reports dated November 10 and December 22, 2016, and February 14, 2017. In his January 16, 2017 report, he disagreed with Dr. Sattel's opinion that appellant could perform light-duty work with restrictions of overhead lifting of her right arm. Dr. Fried indicated that Dr. Sattel's opinion was not well rationalized or supported by the medical evidence. Specifically, Dr. Sattel did not offer objective evidence which discounted or discussed the previously submitted evidence of ongoing pathology as well as appellant's limitations in multiple notes, reports, and examinations as recent as November 10, 2016. Dr. Fried indicated that Dr. Sattel noted positive findings in the right shoulder, but he found appellant did not have objective findings of peripheral neuropathy or brachial plexopathy despite positive EMG nerve conduction studies and neuromusculoskeletal ultrasound evaluations of record, of which he was aware. Additionally, Dr. Sattel did not perform the standard tests on the right side to evaluate for brachial plexus injury including Ross test,

Hunter's test, Wright's test, Adoson's test, or any of the other elevated arm stress tests. Thus, Dr. Fried concluded that Dr. Sattel could not fairly opine as to whether or not a brachial plexus injury on the right side existed or not. He also reviewed the job description for sales attendant and opined that appellant was unable to perform such a job with her accepted conditions. Specifically, Dr. Fried indicated that the constructed position fell outside of the limitations as outlined on the functional capacity evaluation. He opined that appellant had ongoing evidence of her accepted work injuries which disabled her from regular work and activities.

By decision dated April 13, 2017, OWCP denied modification of its January 22, 2016 LWEC determination. It found that appellant had failed to submit evidence sufficient to satisfy the criteria for modification and that the weight of the medical opinion evidence rested with Dr. Sattel.

On appeal counsel asserts that the SOAF provided to the impartial medical specialist failed to include all the accepted conditions and therefore the LWEC determination was erroneous.

LEGAL PRECEDENT

A wage-earning capacity decision is a determination that a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages. Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[7]

Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless it meets the requirements for modification.[8] Chapter 2.1501 of OWCP's procedures contains provisions regarding the modification of a formal LWEC.[9] The relevant part provides that a formal LWEC will be modified when: (1) the original rating was in error; (2) the claimant's medical condition has materially changed; or (3) the claimant has been vocationally rehabilitated.[10] It further provides that the party seeking modification of a formal LWEC decision has the burden to prove that one of these criteria has been met.[11]

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[12] The implementing regulations provide that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP

[7] *Katherine T. Kreger*, 55 ECAB 633 (2004).

[8] *Sue A. Sedgwick*, 45 ECAB 211 (1993).

[9] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity*, Chapter 2.1501 (June 2013).

[10] *Id.* at Chapter 2.1501.3(a) (June 2013).

[11] *Id.* at Chapter 2.1501.4 (June 2013).

[12] 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[13] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight.[14]

OWCP's procedures provide as follows:

> "The [claims examiner] is responsible for ensuring that the SOAF is correct, complete, unequivocal, and specific. When the [district medical adviser], second opinion specialist, or referee physician renders a medical opinion based on an SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[15]

ANALYSIS

The Board finds that appellant has established that the January 20, 2016 LWEC determination was erroneously issued.

The Board finds that Dr. Sattel's opinion was based on an inaccurate SOAF. In securing the opinion of a medical specialist, Chapter 2.809.3 of OWCP's procedures provides that a SOAF and development questions are to be prepared by the claims examiner for use by the physician.[16] The claims examiner is required to set forth the relevant facts of the case, including the employee's date of injury, age, job held when injured, the mechanism of the injury, and any conditions claimed or accepted by OWCP.[17] Dr. Sattel was provided a SOAF dated April 11, 2012 with an addendum dated May 14, 2014. The April 11, 2012 SOAF listed the accepted conditions only for a right shoulder strain and brachial plexus neuropathy. It did not include the accepted right thoracic outlet syndrome, which was accepted in 1997. The April 11, 2012 SOAF was therefore improper as it did not include all the accepted conditions. The May 14, 2014 addendum to the SOAF only noted that appellant was examined by Dr. Draper on April 20, 2012 and that Dr. Fried was her treating

[13] 20 C.F.R. § 10.321; *S.R.*, Docket No. 09-2332 (issued August 16, 2010); *Elaine Sneed,* 56 ECAB 373 (2005).

[14] *Gloria J. Godfrey,* 52 ECAB 486 (2001); *Jacqueline Brasch (Ronald Brasch),* 52 ECAB 252 (2001).

[15] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

[16] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts,* Chapter 2.809.3 (September 2009).

[17] *Id.*; *see A.C.*, Docket No. 09-0389 (issued October 7, 2009).

physician, this SOAF did not list any accepted conditions. Dr. Sattel's report is, therefore, not entitled to the special weight of the medical evidence.[18]

Once OWCP undertakes development of the record, it has the responsibility to do so in a proper manner.[19] Given the error on the SOAF on which Dr. Sattel's report was based, it should not have afforded his opinion special weight on the issue of appellant's wage-earning capacity. Thus, appellant has shown that the January 20, 2016 LWEC determination was erroneous.[20]

CONCLUSION

The Board finds appellant has met her burden of proof to modify the January 20, 2016 LWEC determination.

[18] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, at Chapter 2.809 explains that the SOAF is one of the most important documents a claims examiner (CE) prepares. It is the written summary of the CE's findings of facts. It serves as a factual frame of reference for the medical specialist, the CE or other case reviewer. When it is used by physicians who base their medical opinions solely on the information presented in the SOAF, the outcome of a claim may depend on its completeness and accuracy. Therefore, the SOAF must clearly and accurately address the relevant information.

[19] *Melvin James*, 55 ECAB 406 (2004).

[20] In light of this disposition, the Board will not review the evidence submitted on reconsideration to determine whether the other criteria for modification have been met.

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 23, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board